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REPORT OF THE EXPERT MEETING ON CAPACITY-BUILDING IN THE AREA OF ELECTRONIC COMMERCE: LEGAL AND REGULATORY DIMENSIONS

Held at the Palais des Nations, Geneva,
from 14 to 16 July 1999

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I. AGREED CONCLUSIONS AND RECOMMENDATIONS [1]

1. The Expert Meeting on Capacity-Building in the Area of Electronic Commerce: Legal and Regulatory Dimensions, having examined various legal aspects of electronic commerce, decided to bring the following conclusions and recommendations to the attention of the Commission on Enterprise, Business Facilitation and Development at its fourth session:

2. The importance of electronic commerce as a vehicle for promoting the participation of developing countries in global trade and development should be recognized. To do so, the legal issues of electronic commerce need to be addressed and monitored on a regular basis.

3. Although the current legal infrastructure is generally applicable to the electronic environment, most legal infrastructures and laws were developed in the absence of electronic systems. Therefore, these laws may create uncertainty in the electronic environment because they may not have the same legal effect as that seen in the traditional paper-based environment.

A. Addressed to national Governments

4. Governments are urged to examine their existing legal infrastructure to see if paper-based form requirements prevent laws from being applied to electronic transactions and to determine whether such form requirements should be adjusted to make their laws technology-neutral and permit their interpretation and application in an electronic environment.

5. In reviewing their legal infrastructures, Governments are encouraged to give consideration to using the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, as well as other instruments on electronic commerce prepared by UNCITRAL and other organizations, as a basis for preparing new laws or adjusting current laws. Where appropriate, Governments should also consider the introduction of rules to give certainty with regard to the legal effect of using specific technologies within a technologically neutral legal infrastructure.

6. Governments are encouraged to participate in the preparation of various legal instruments being considered in international forums.

7. Governments are urged to promote public awareness and education of all aspects of electronic commerce and the opportunities and benefits it offers.

8. Governments are encouraged to foster cooperation among the public and private sectors and academia in the study, development and establishment of policies and rules on electronic commerce.

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[1] As adopted by the Expert Meeting at its closing plenary meeting on 16 July 1999.

9. Governments are encouraged to promote investment in, and access to, telecommunications and information technology infrastructures in order to take advantage of the benefits they offer to all sectors of society, especially the public and private sectors and academia, in order to promote the development of electronic commerce.

10. Developed country Governments are urged to dismantle barriers to global electronic commerce for developing countries by removing restrictions on the export of technology, especially with respect to state-of-the-art encryption systems and products, as well as associated technologies and computer systems.

11. Governments of developed and developing countries, especially those who are members of regional economic groupings, are encouraged to establish cooperative relationships so as to increase their capacity to deal with the complexity of the issues that have arisen due to the development of information and communication technologies in such areas as taxation, customs, intellectual property, domain names, computer crime, Internet content regulation, privacy and data protection, consumer protection, certification authorities, and the role of accreditation and standardization bodies.

B. Addressed to the international community

12. International organizations involved in electronic commerce should cooperate and coordinate their activities to ensure an adequate exchange of information and to avoid duplication of efforts.

13. International organizations are encouraged to strengthen their assistance to developing countries in the following areas:

- Reviewing and adapting their national laws to accommodate electronic commerce;

- Promoting awareness, education and training; and

- Developing/strengthening electronic commerce infrastructures.

14. International organizations involved in preparing legal instruments and rules should continue and complete their work without undue delay, including on instruments concerning issues or topics referred to in paragraphs 11 and 15 herein.

C. Addressed to UNCTAD

15. UNCTAD should keep under review and monitor developments pertaining to legal and regulatory aspects of electronic commerce and keep countries informed thereof, particularly on the following questions: jurisdiction, applicable law, dispute resolution mechanisms, taxation,

intellectual property, domain names, privacy and data protection, consumer protection, computer crime. Internet content regulation, authentication, legal rules on certification authorities and their impact on cross-border recognition of certificates, and the role of accreditation and standardization bodies. In doing so, close cooperation should be maintained with the relevant international organizations, such as UNCITRAL, Economic Commission for Europe, World Intellectual Property Organization , World Trade Organization, and Organisation for Economic Cooperation and Development. UNCTAD should also examine the implications of electronic commerce for the multilateral commitments undertaken by countries in the field of liberalization of international trade.

16. UNCTAD should create means for the dissemination of information relating to legal issues of electronic commerce, especially through the combination of Web-based tools of information management/dissemination and its linkages with the concerned international organizations.

17. UNCTAD, in cooperation with other relevant international organizations, should seek to assist developing countries, upon request, in preparing legislation to accommodate electronic commerce.

18. UNCTAD should intensify its training activities in the field of legal aspects of electronic commerce, especially for developing countries and their small and medium-sized enterprises. Particular attention should be given to including a special segment on legal aspects of electronic commerce in UNCTAD's existing training programmes, such as TRAINFORTRADE.

19. UNCTAD should give consideration to the convening of a follow-up meeting of experts to review and discuss legal and regulatory developments and problems at the international, regional and national level and to determine possible approaches and solutions pertaining to legal issues of electronic commerce.

II. CHAIRPERSON'S SUMMARY

20. The **Deputy Secretary-General of UNCTAD** highlighted the importance of electronic commerce as a tool that enabled developing countries to participate more actively in the global economy by lowering transaction costs and diminishing geographical disadvantages. Internet-based trade could help smaller economies to translate the information revolution into new competitive advantages. The advent of electronic commerce in developing countries could give small and medium-sized enterprises the ability to compete globally and allow for the creation of new businesses by individual entrepreneurs, just as it had done in the developed countries.

21. However, many obstacles still lay in the path of some of the developing countries that would like to embark on electronic commerce strategies. Among the prerequisites for the growth of electronic commerce was the need for a legal and policy infrastructure that was supportive of and conducive to the practice of electronic commerce. The existence of a predictable and supportive legal framework could significantly enhance the level of trust, which was necessary for the development of electronic commerce. He emphasized that electronic commerce was not developing in a legal vacuum, since most of the existing rules and regulations applicable to trade would also apply to it. However, concerns had been expressed that existing paper-based legal systems might be unable to accommodate electronic commerce and could lead to uncertainty, which would hamper global electronic trade. The speed at which electronic commerce developed would depend to a large extent on the existence of a legal framework that facilitated electronic commerce and inspired the trust of both businesses and consumers. This element of trust was particularly important for the smaller players, including developing countries and their small and medium-sized enterprises.

A. Legal framework for electronic commerce

22. The first informal meeting, on the basic elements of a legal framework for electronic commerce, opened with presentations by organizations involved in the preparation of model laws, guidelines, standard contract provisions and rules and regulations covering certain aspects of electronic commerce, such as the United Nations Commission on International Trade Law (UNCITRAL), United Nations Economic Commission for Europe (ECE), World Intellectual Property Organization (WIPO), World Trade Organization (WTO) and the European Commission.

23. While it was acknowledged that most of the existing rules and legislation would in general also apply to electronic commerce, concerns were expressed that the existing paper-based legal systems might be insufficient to accommodate electronic commerce and might create uncertainty, thereby hampering global electronic trade. For example, the requirements in national laws for the use of "written", "signed" or "original" documents would constitute barriers to the development of electronic commerce.

24. In this context, a representative of UNCITRAL described the UNCITRAL Model Law on Electronic Commerce, adopted in 1996. That law aimed at providing national legislators with a set of internationally acceptable rules on how a number of these legal obstacles may be removed and a more secure legal environment created for electronic commerce. The objectives of the Model Law include enabling or facilitating electronic commerce by providing equal treatment to users of paper-based documentation and users of computer-based information. The principles expressed in the Model Law were also intended for use by individual parties in the drafting of contractual solutions that may form part of the legal framework of electronic commerce. The Model Law is being used in numerous countries as a basis for enacting legislation to accommodate electronic commerce.

25. In discussing a mechanism for the replacement of trade and transport documents with electronic alternatives (the Bolero system), a resource person explained that the requirements for written, signed or original documents in national laws, often dating back to the nineteenth century, indeed constituted an obstacle to the implementation or application of the project in those countries. The Bolero system aimed at providing a solution to the most challenging aspect of electronic commerce - the replacement of negotiable documents of title, such as bills of lading, with an electronic alternative.

26. Experts also noted the role of individual trading parties in providing solutions to some of the questions raised by electronic commerce in their contractual agreement. A representative of ECE described ongoing work in the preparation of a draft "Electronic Commerce Agreement", referred to as the "E-Agreement", which is intended to meet the commercial requirements of business-to-business electronic commerce partners. The E-Agreement aims at addressing all forms of available electronic communications. It provides a basic set of contractual provisions which can ensure that electronic commercial transactions may subsequently be concluded by commercial partners within a sound legal framework. Limitations on the use of the contractual agreements, such as the existence of mandatory national laws and regulations covering consumer protection issues or protection of third parties, were also noted.

27. In considering intellectual property dimensions of electronic commerce, experts stressed the importance of a suitable intellectual property protection system in maintaining a stable and positive environment for the development of electronic commerce. Electronic commerce raises complex challenges for the exploitation and protection of intellectual property on global digital networks. In this context, the slowness in preparing multilateral instruments governing electronic commerce issues is an important challenge for the international community. A number of new legal and policy issues have arisen, and the applicability of traditional concepts such as jurisdiction and territoriality is being questioned. Reference was made to the activities of WIPO in responding to some of the challenges raised by the advent of electronic commerce, including the "Internet Treaties", signed in December 1996; the WIPO Internet domain name process; and the on-line dispute resolution mechanism. Important work remained to be done in the field of domain names, however. Many experts expressed concern about the absence of internationally

agreed rules governing domain names registration, which often resulted in cybersquatting and prejudiced the interests of enterprises in developing countries.

28. Concerning the trade-related aspects of electronic commerce within the WTO framework, the range of WTO disciplines that could affect electronic commerce is broad, involving services, intellectual property, goods, government procurement, trade-related aspects of intellectual property rights (TRIPS) and technical barriers to trade. The standstill declaration on the imposition of customs duties on electronic transmissions adopted by the WTO Ministerial Conference in May 1998 was discussed, as were the economic implications of such measures for developing economies. The application of the WTO principles to electronic commerce will not involve the preparation of new rules, but rather the application of existing rules to the new electronic environment.

29. Also debated by the Expert Meeting was the importance of establishing an internationally acceptable harmonized legal framework for electronic signatures and authentication. Experts were referred to the proposed European Commission Directive on a Community framework for electronic signatures. Under its provisions, electronic signatures would be legally recognized in a manner similar to handwritten signatures. To avoid exclusion of future technologies, the proposed directive took a technology-neutral approach based on a broad concept of electronic signatures which encompasses various electronic means of authentication, including digital signatures. It allows for the coexistence of accredited and non-accredited certification service providers. It further addresses the global dimension of electronic commerce by ensuring that certificates issued in a third country are recognized as legally equivalent to certificates issued in the European Community under certain stipulated conditions.

30. A number of experts emphasized that a mechanism for secure authentication of electronic communication is critical to the development of electronic commerce. The ongoing UNCITRAL work on the preparation of uniform rules on electronic signatures and certification authorities should be completed as soon as possible. Uniform rules on the subject would assist developing countries wishing to prepare legislation on electronic signatures.

31. Further issues discussed by experts included jurisdiction, applicable law, dispute settlement mechanisms, computer crime, taxation, restrictions on the exports of encryption technology, and consumer protection.

B. Specific concerns of developing countries

32. It emerged from the discussions and exchange of views that a number of developing countries are in the process of preparing legislation to accommodate electronic commerce. In some countries, the work is focused on preparing a legal framework for the recognition of electronic signatures, digital signatures and certification authorities. Many participants expressed concern as to the lack of internationally acceptable rules and guidelines governing the subject.

33. Alarm was also raised about restrictions imposed on the export of technology, especially with respect to state-of-the art encryption standards and associated technologies and computing

systems. The need for an international scheme for registration of domain names was deemed an important issue for consideration by the international community.

34. The advent of electronic commerce and the disappearance of territorial borders have raised questions about the applicability of traditional principles on jurisdiction and applicable law in an electronic environment. International developments on the subject should be kept under review.

35. The need for wider dissemination of information on international developments pertaining to the legal and regulatory aspects of electronic commerce was emphasized. Similarly, the need for training and education, especially for small and medium-sized enterprises, was considered an important element in the development of electronic commerce. Furthermore, the need for technical assistance to developing countries, and particularly the least developed countries (LDCs), in adapting their national law to accommodate electronic commerce was viewed by many experts as a priority. Requests were addressed to the international community, including UNCTAD, to enhance their activities in these areas.

36. The Meeting was thought to have provided an excellent opportunity for the exchange of views among experts from both developed and developing countries. It was considered to have been an important occasion for taking stock of legal and regulatory developments at the national and international level, enabling experts to give consideration to all legal aspects of electronic commerce, including their impact, problem areas and possible solutions. Since the situation is still evolving and deliberations at the international level are continuing towards the establishment of the necessary rules and guidelines, the experts requested UNCTAD to consider convening a follow-up meeting to review and discuss developments and problems and to determine possible approaches and solutions pertaining to legal issues of electronic commerce.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

37. In accordance with the recommendation made by the Commission on Enterprise, Business Facilitation and Development at the closing meeting of its third session on 14 December 1998,[2] the Expert Meeting on Capacity-Building in the Area of Electronic Commerce: Legal and Regulatory Dimensions was held at the Palais des Nations, Geneva, from 14 to 16 July 1999. The meeting was opened on 14 July 1999 by Mr. Carlos Fortin, Deputy Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

38 At its opening meeting, the Expert Meeting elected the following officers to serve on its Bureau:

Chairperson: Mr. Oscar Hernández (Venezuela)

Vice-Chairperson-cum-Rapporteur: Mr. Bernard Stoven (France)

C. Adoption of the agenda

(Agenda item 2)

39. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in TD/B/COM.3/EM.8/1. Accordingly, the agenda for the Meeting was as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. Electronic commerce: Legal and regulatory dimensions
4. Adoption of the outcome of the Meeting

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[2] See Report of the Commission on Enterprise, Business Facilitation and Development on its third session (TD/B/45/15-TD/B/COM.3/20), paragraph 36.

D. Documentation

40. For its consideration of the substantive agenda item (item 3), the Expert Meeting had before it the following reports prepared by the UNCTAD secretariat:

"Legal dimensions of electronic commerce" (TD/B/COM.3/EM.8/2); and

"Electronic commerce: Legal considerations" (UNCTAD/SDTE/BFB/1).

E. Adoption of the outcome of the Meeting

(Agenda item 4)

41. At its closing meeting, on 16 July 1999, the Expert Meeting adopted the agreed conclusions and recommendations reproduced in section I above, and authorized the Chairperson to prepare a summary of the Meeting (see section II above).

Annex

ATTENDANCE *

1. Experts from the following States members of UNCTAD attended the meeting:

Angola
Argentina
Australia
Bahrain
Bangladesh
Belarus
Belgique
Benin
Bolivia
Brazil
Brunei Darussalam
Burkina Faso
Cameroon
Canada
Cape Verde
Chad
Chile
China
Colombia
Costa Rica
Côte d'Ivoire
Cuba
Czech Republic
Democratic People's Republic of Korea
Democratic Republic of the Congo
Denmark
Djibouti
Dominican Republic
Egypt
Ethiopia
Finland
France
Gabon
Germany
Ghana
Guatemala
Guinea
Honduras
Hungary
India
Indonesia
Iran (Islamic Republic of)
Italy
Japan
Lao People's Democratic Republic
Lesotho
Madagascar
Malaysia
Malta
Mauritius
Mexico
Morocco
Mozambique
Nepal
Netherlands
Nicaragua
Niger
Pakistan
Peru
Philippines
Romania
Russian Federation
Saint Lucia
Saudi Arabia
Sierra Leone
Singapore
Slovakia
Spain
Sri Lanka
Sudan
Switzerland
Thailand
Trinidad and Tobago
Tunisia
Turkey
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
Venezuela
Viet Nam
Yemen
Zimbabwe

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*For the list of participants, see TD/B/COM.3/EM.8/INF.1.

2. The following intergovernmental organizations were represented at the meeting:

South Centre
European Community
Arab Labour Organization
Organization of the Islamic Conference
International Criminal Police Organization
Commonwealth Secretariat

3. The following specialized agencies and related organizations were represented at the meeting:

World Bank
International Telecommunication Union
World Intellectual Property Organization
United Nations Industrial Development Organization
World Trade Organization

4. The Economic Commission for Europe and the United Nations Commission on International Trade Law were represented at the meeting.

5. The following non-governmental organizations were represented at the meeting:

General Category

World Federation of United Nations Associations
World Savings Bank Institute

Specially Invited

Mr. Alan Asay, Bolero Operations Limited
Mrs. Catherine Bloomfield, Women's International Shipping and Trading Association (WISTA)
Ms. Karine Ferreira, Webforce International
Ms. Marisol Mellet, United Towns Agency for North-South Cooperation
Ms. Alice Ngo, Webforce International
Mr. G. Rezzonico, Head, Legal Department, KPMG Fides, Geneva